

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANTONIO MONTANA CURRY,

Defendant-Appellant.

UNPUBLISHED

March 25, 2014

No. 312265

Wayne Circuit Court

LC No. 11-012166-01-FC

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant, Dantonio Montana Curry, of first-degree felony murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court later vacated the premeditated murder conviction and sentenced defendant to life imprisonment without parole for the felony-murder conviction and to a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant's convictions arise from the October 13, 2011, fatal shooting of Daryl King, who was found shot to death in his girlfriend's car in Detroit. A witness observed defendant and King inside the vehicle approximately 20 minutes before the shooting. After hearing gunshots, the witness observed King slumped over the steering wheel and blood on the window of the vehicle. The witness saw defendant rummage through King's pockets and the vehicle for approximately 10 minutes, and then saw defendant leave the scene carrying a black plastic bag and a handgun.

In his sole issue on appeal, defendant, who is black, argues that trial counsel was ineffective for failing to properly challenge the prosecutor's use of peremptory challenges to excuse black jurors. Because defendant did not raise an ineffective assistance of counsel issue below in a motion for a new trial or request an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973), our review of this issue is limited to errors apparent from the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability

that, but for counsel's error, the result of the proceeding would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

Under the Equal Protection Clause of the Fourteenth Amendment, a party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race. *Batson v Kentucky*, 476 US 79, 86-87; 106 S Ct 1712; 90 L Ed 2d 69 (1986). In *Batson*, the United States Supreme Court announced a three-step process for determining whether a peremptory challenge violates the Equal Protection Clause. *Id.* at 96-98. First, the party challenging the peremptory dismissal must make a prima facie showing of discrimination. *Id.* at 96. To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all of the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. *Id.* Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. *Id.* at 97. Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. *Id.* at 98.

Defendant's ineffective assistance of counsel claim depends on whether he can establish a valid basis for a *Batson* challenge. According to the parties' statements at a motion hearing, the prosecutor dismissed one or two black jurors on the first day of jury selection¹ and did not dismiss any black juror on the second day of jury selection. On the third day of jury selection, the prosecutor peremptorily dismissed two or three white jurors, but again did not dismiss any black juror. Additionally, on the third day of jury selection, the prosecutor initially expressed an intention to use a peremptory challenge to excuse CH, a black juror. But following a sidebar conference, the parties were permitted to further question CH, after which the prosecutor withdrew her peremptory challenge to CH. At a later motion hearing, defense counsel asserted that he intended to raise a *Batson* issue if CH had been excused, but because the prosecutor ultimately agreed to allow CH to remain on the jury, there was no basis for raising a *Batson* challenge.

On this record, defendant cannot establish the basis for a *Batson* challenge. Initially, the record discloses that the parties were aware that there had been a small number of minorities in the jury venires², and that only three blacks remained on the final jury panel. However, as our Supreme Court observed in *People v Knight*, 473 Mich 324, 349; 701 NW2d 715 (2005), "[p]rotecting a defendant's right to a fair and impartial jury does not entail ensuring any particular racial composition of the jury. The goal of *Batson* and its progeny is to promote racial neutrality in the selection of a jury and to avoid the systematic and intentional exclusion of any

¹ The prosecutor noted that defense counsel had dismissed more black jurors than she had.

² Additional potential jurors were needed during voir dire, requiring more than one venire.

racial group.” Thus, the mere fact that blacks may have been underrepresented on defendant’s jury did not provide a basis for raising a *Batson* issue.

Defendant contends that when discussing the issue involving juror CH, the parties, including defense counsel, erroneously focused on whether there had been a “pattern” of peremptory challenges against black jurors. Thus, defendant suggests that defense counsel misunderstood the criteria for evaluating a *Batson* issue. Defendant correctly observes that “*Batson* and its progeny do not *require* a pattern to be shown because the striking of even a single juror on the basis of race violates the Constitution.” *Knight*, 473 Mich at 359 n 3 (CAVANAGH, J, concurring in part and dissenting in part) (emphasis in the original). See also *Batson*, 476 US at 96-97. However, defendant incorrectly suggests that the existence of a pattern of strikes against black jurors is not relevant. On the contrary, a pattern of strikes may give rise to an inference of discrimination, which is a necessary element of a defendant’s *prima facie* case under *Batson*. *Id.* at 97.

Moreover, and significantly, defendant has not provided any basis for concluding that the circumstances surrounding the peremptory dismissal of any black juror raised an inference of discrimination. Indeed, defendant does not even discuss the circumstances surrounding the prosecutor’s peremptory dismissal of black jurors, nor is there any indication in the record that the prosecutor excused these jurors because of their race. The trial court commented at the motion hearing that there had not been a pattern of strikes against black jurors, and defendant has not identified any basis in the record for questioning that conclusion. Contrary to defendant’s contentions, the mere fact that the prosecutor used peremptory challenges to excuse some blacks from the jury venire is insufficient to make a *prima facie* showing of discrimination. *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Furthermore, the record discloses that three black jurors ultimately served on defendant’s jury, and that the prosecutor did not exercise all of her peremptory challenges. A prosecutor’s acceptance of a jury with minority members when peremptory challenges remained “is strong evidence against a showing of discrimination.” *Id.* Lastly, although the prosecutor initially expressed an intent to excuse juror CH, who was black, the prosecutor ultimately withdrew her challenge to CH. Defendant fails to establish a valid *Batson* issue.

In light of the foregoing, defendant has not demonstrated any basis for concluding that defense counsel could have raised a valid *Batson* issue. Defense counsel is not ineffective for failing to raise a meritless motion or make a meritless objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan